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GENERAL AND REVENUE SECRETARIAT.

Serial Nos. 12

Part B for May 1938

SUBJECT.

Opinion by Hon. William H. Wadhams Legal Adviser to the Chamber of Princes on safeguarding the rights & privileges of the Rulers of Indian States on entering the Federation

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CONFIDENTIAL

For Private Circulation only

Opinion by Hon. William H. Wadhams, Legal Adviser to the Chamber of Princes on Safeguarding the Rights & Privileges of the Rulers of Indian States acceding to Federation

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Chamber of Princes.

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Council House,
NEW DELHI,
April, 1938.

STRICTLY CONFIDENTIAL.

39, Avenue George V,
(Entrance 17 Rue Quantin Bauchart)
Paris. (8e)

March 1st, 1938.

To,
His Highness Maharaja Jam Sahib
of Nawanagar, K.C.S.I.,
Chancellor, Chamber of Princes,
New Delhi.

CHAMBER OF PRINCES REPORT No. 9.

Your Highness,

Since submitting my last Report, there have been no new developments in London with respect to Federation.

Enclosed please find my opinion as Legal Adviser to the Chamber of Princes, on "Safeguarding the Rights and Privileges of the Rulers of Indian States Acceding to Federation".

This opinion reviews the entire subject of rights and privileges, the origin and source of Federal and Provincial powers and the nature of the rights and privileges of the Rulers. It discusses the meaning of the provisions of the Government of India Act with respect to the limitations of the exercise of powers, authority and jurisdiction conferred by the Rulers on the Federal Legislature.

The opinion disposes of the objection to including in the Instrument of Accession rights in addition to those contained in the First Schedule on the ground that such additional rights are extra-territorial. It contains a discussion of the origin and development of extra-territoriality and its legal application, showing that the rights and privileges of the Rulers contained in the First and Third Schedules are not extraterritorial rights. The rights and privileges are classified into Crown Rights, Limitations in the First Schedule, and Additional Rights in the Third Schedule, and principles are suggested in aid of the preparation of the list and Schedules.

To obviate the objection that the powers conferred by the Act on the Federation and the Provinces cannot be limited by the Instrument of Accession, it is suggested that a new clause be added to the Instrument of Accession providing that laws of the Federation and the Provinces which infringe the rights and privileges of the Rulers enumerated in the Third Schedule shall not be applicable to the States.

A new clause is also suggested to be added to the Instrument of Accession, one protecting "Crown Rights".

The insufficiency of the protection of the Rulers' rights and privileges by the exercise of the special responsibilities of the Governor-General and the Governors is considered, and the extent of the jurisdiction of the Federal Courts examined.

A suggestion is made of a method to protect agreements with the Provinces by bringing them within the jurisdiction of the Federal Court, where desired, as a condition of acceding to the Federation.

The subject of rights and privileges, although discussed with the Special Representatives of the Viceroy and at the several meetings of the Rulers and Conferences of their Ministers, has not heretofore been examined with special reference to the legal interpretation of the nature of such rights and their relation to the provisions of the Government of India Act.

Such an examination is found in this opinion, and it discloses that, by applying the principles and methods suggested, the objections may be obviated and all the rights and privileges of the Rulers safeguarded.

The suggestions contained in this opinion would require the addition of the Third Schedule to the Instrument of Accession and the amendment of the draft form instrument contained in the printed report of the Constitutional Committee of the Chamber of Princes, annexure IV, by adding the proposed new clauses Nos. 11 and 12.

With high regards,

Sincerely yours,

(Sd.) Wm. H. WADHAMS,
Legal Adviser to the
Chamber of Princes

OPINION BY HON. WILLIAM H. WADHAMS. LEGAL ADVISER OF THE CHAMBER OF PRINCES ON SAFEGUARDING THE PRIVILEGES AND RIGHTS OF THE RULERS OF INDIAN STATES ACCEDING TO FEDERATION.

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OPINION BY HON. WILLIAM H. WADHAMS LEGAL ADVISER OF THE CHAMBER OF PRINCES ON SAFEGUARDING THE PRIVILEGES AND RIGHTS OF THE RULERS OF INDIAN STATES ACCEDING TO FEDERATION.

A letter to His Highness the Chancellor from the Nawab Sahib of Sachin emphasizing the fundamental importance to the Rulers of the preservation of their rights and privileges and requesting advice of the Legal Adviser to the Chamber of Princes "as to the best form to secure the preservation of these rights", and "whether it would be a sufficient safeguard if these rights are appended as a separate Schedule to the Instrument of Accession", has been transmitted to me by the Secretary of the Chamber of Princes.

Pursuant to this inquiry the Secretary, on behalf of the Chamber of Princes, has requested an opinion "as to how the States should proceed to secure effective safeguards for their extra-territorial rights."

The inquiry is so comprehensive that it necessitates an examination of the origin and extent of the powers conferred by the Government of India Act, 1935, upon the Federation and the Provinces, as well as the origin and nature of the rights and privileges which the Rulers acceding to the Federation desire to preserve, the objections which have been raised to their reservation in the Instrument of Accession and how best to safeguard them.

PART I.

THE ORIGIN AND EXTENT OF THE POWERS CONFERRED ON THE FEDERATION AND THE BRITISH PROVINCES.

The existing rights and privileges of British India are derived from His Majesty. The Joint Committee on Indian Constitutional Reform outlined the legal basis of reconstituting the Government of India, first by the Crown's resumption of all rights, authority and jurisdiction which had been previously granted to British India and then by redistributing them to the Federation and the Provinces as follows:

> "It is clear that, in any new Constitution in which auto-
> "nomous Provinces are to be federally united under the Crown,
> "not only can the Provinces no longer derive their powers
> "and authority from devolution by the Central Government,
> "but the Central Government cannot continue to be an agent
> "of the Secretary of State. Both must derive their powers
> "and authority from a direct grant by the Crown. We appre-
> "hend, therefore, that the legal basis of the reconstituted

"Government of India must be, first, the resumption into the "hands of the Crown of all rights, authority and jurisdiction "in and over the territories of British India, whether they are "at present vested in the Secretary of State, the Governor-"General in Council, or in the Provincial Governments and "Administrations; and second, their redistribution in such manner "as the Act may prescribe between the Central Government "on the one hand and the Provinces on the other. A Fede-"ration of which the British Indian Provinces are the consti-"tuent units will thereby be brought into existence." [1]

In conformity with this theory, His Majesty is recognized as the foundation and the source of the Federal and Provincial powers, authority and jurisdiction in the Government of India Act which provides:

"All rights, authority and jurisdiction heretofore belonging "to His Majesty the King, Emperor of India, which appertain "or are incidental to the Government of the territories in India "for the time being vested in him, and all rights, authority "and jurisdiction exercisable by him or in relation to any "other territories in India, are exercisable by His Majesty, "except in so far as may be otherwise provided by or under "this Act, or as may be otherwise directed by His Majesty." [2]

From this section it is clear that it is His Majesty who exercises "all rights, authority and jurisdiction" in British India, except in so far as they are exercisable under the Government of India Act.

His Majesty has transferred by the Act the exercise of extensive rights and authority and jurisdiction heretofore belonging to him, not only to the Federation, but also to the Provinces.

Both the Federation and the Provinces have been given legislative powers and executive authority.

His Majesty, through the Act of Parliament, may however only transfer such powers and authority as was at the time of the Act vested in him, and inasmuch as at that time there existed rights and privileges of the Rulers, recognized by His Majesty, it could not have been contemplated that it was intended that such rights and privileges should by the Act be extinguished or nullified.

In an equitable sense, it was not within the gift of His Majesty and in a legal sense not within the power of Parliament, to transfer the exercise of authority in such a way as to enable the Federation or the Province to annul the existing rights and privileges of the Rulers and the recognized self-imposed obligations of the Crown.

Such was not the intention, as appears in the Act, which provides that the rights, authority and jurisdiction conferred by the Crown

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1. Vol. I, Part I, Report, Sec. 153, p. 86
2. Govt. of India Act, 1935, Sec. 2 (1)

on the Federation will not extend to the Rulers of Indian States except through the voluntary accession of the Indian State to the Federation "by virtue of his Instrument of Accession but subject "always to the terms of the Instrument." [3]

The transfer of legislative power and of executive authority to the Federation and the Provinces is therefore subject to such limitations and reservations in the Instruments of Accession as will assure to the Rulers the continued exercise and enjoyment of those rights and privileges which existed before the enactment of the Government of India Act.

PART II.

THE ORIGIN AND NATURE OF THE RIGHTS AND PRIVILEGES OF THE RULERS OF INDIAN STATES.

The rights and privileges of the Rulers of Indian States are of two kinds:

1 — Those which are inherent in the Sovereignty of the Ruler. They are personal to him and include such rights as are customarily recognized by courtesy in jurisdictions outside the State.

These rights and dignities will be more fully discussed in this opinion in Part IV concerning Extra-territorial Rights, and in Part V with respect to the Classes of Rights and Privileges enjoyed by the Rulers.

2 — Those which are derived from treaties and agreements with His Majesty or with the Crown, His Majesty's Government of India, or through established usage recognized by the Crown.

This class of rights and privileges, it will be noted, is derived from the same source as the rights and privileges granted to the Federation and the Provinces, namely, from His Majesty the King Emperor.

The Federation and the Provinces have, as we have seen, acquired their powers, authority and jurisdiction from His Majesty through an Act in Parliament, and the Rulers have acquired their rights and privileges through His Majesty by treaties, sanads, agreements and usage recognized by His Majesty and His Majesty's Government of India.

The Rulers are given the opportunity to accede to the Federation authorized by the Act and, by so doing, to submit to the exercise by it of rights, authority and jurisdiction heretofore exercised by His Majesty. In the exercise of such jurisdiction heretofore, His Majesty has honoured the treaties, sanads and agreements with the Rulers, recognizing the rights and privileges thereby established.

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3. Govt. of India Act, 1935, Sec. 6 (1).

It is therefore appropriate, and such appears to have been the intention as expressed in the Act, that the powers, authority and jurisdiction conferred by the Act on the Federation and the Provinces should not be so exercised as to infringe the rights and privileges of the Rulers which are derived from the same source of authority, namely, the Crown.

It would not be necessary to safeguard these rights and privileges were it not for the fact that by the transfer of the exercise of power and authority to the Federation and the Provinces, His Majesty has conferred jurisdiction upon the new political corporate entities with whom the States have not made treaties or agreements and which, therefore, if unrestricted, would have powers which could be exercised to infringe the rights and privileges enjoyed by the Rulers.

It is for the purpose of safeguarding these rights and privileges, that the Act provides for the limitation of Legislative and Executive authority conferred upon the Federation and for the protection of their rights and privileges by appropriate provisions in their Instruments of Accession.

These rights and privileges existed before the Government of India Act became a Law. They are not subject to any Act of Parliament, which can neither create nor destroy them. They still exist after the passage of the Government of India Act, but as the Act purports to give authority to the Federation and to the Provinces which may be exercised to infringe or destroy these rights and privileges, it is fitting that the Instrument of Accession should reserve them and so make it clear that, by acceding to the Federation, the Ruler has not acquiesced in any Federal or Provincial Legislative power or Executive authority which may imperil or destroy them.

The Instrument of Accession is an accord between the Ruler and His Majesty. It is the measure of the extent of the Ruler's acceptance of the exercise of jurisdiction by the Federation and the Provinces in relation to his State.

The question must be settled in the Instrument of Accession, for there is not only a relation between His Majesty and the Ruler, but by His Majesty's Act in conferring powers on the Federation and the autonomous Provinces, a relation concerning the same subject matter has been created between the Ruler and the Federation and the Provinces.

His Majesty's Government has repeatedly given assurance that rights and privileges of the Rulers would not be curtailed but would be continued, whether they joined or did not join the Federation.

Therefore it is evident that the transfer of powers and authority to the Federation and the Provinces by His Majesty was intended to be subordinate to such rights and privileges.

Inasmuch as Federal powers will be subject to interpretation by the Federal Court, and the status of an Indian State in the Federation will be determined by the provisions in the Ruler's Instrument of Accession, it is necessary that the Instrument should contain in clear and unmistakable language a reservation of all those rights and privileges which the Ruler enjoys and with respect to which the Government of India Act has given power, authority or jurisdiction to the Federation or to the Provinces to destroy or infringe.

Rights which may arise outside of the Federal sphere, that is, where no power, authority or jurisdiction has been given to the Federation with respect to such rights, need not be included in the schedules of reserved rights. These rights are in the sphere of relations with the Crown. For example, a right claimed to territory leading to a boundary dispute is not within the Federal sphere, as no authority is given to the Federation or to any of its units by the Government of India Act to determine such a dispute. A boundary dispute, therefore, between the State and a Province or between States, would continue to be a Crown subject to be determined by negotiations with the Representative of His Majesty.

A general cluase providing that the Accession of a State shall not be deemed a waiver of the obligation of the Crown to protect the territorial integrity of the State and other Crown rights of the Ruler is discussed in Part V of this opinion.

Privileges and rights which are within the Federal sphere, may be classified under two heads:

First, those which may be affected by the Federal Legislative powers accepted by the Ruler, found in the First Schedule of the Instrument of Accession.

The appropriate method of safeguarding rights and privileges of this class is discussed in Part V of this opinion.

The second class has been described as "extra-territorial", "extra-State", or "additional rights", found in the Third Schedule of the Instrument of Accession.

The terminology is misleading.

The so-called "additional rights", have the same origin in agreements with His Majesty or His Majesty's Government, exist by virtue of the same authority and have the same value as the rights which are to be preserved by the limitations of the items of the Federal Legislative List, accepted by the Ruler in the First Schedule. The division into two classes is made for convenience. After listing in the First Schedule the limitations to the items of the Federal Legislative List which the Ruler had accepted, it was discovered that such limitations did not cover all the recognized existing rights and privileges which it was within the power of the Federation to infringe and, as it was the intention of all parties that these rights and privileges

should be continued, it is proposed to add to the Instrument of Accession an additional list of such rights and privileges in a Third Schedule.

The Additional List is discussed in Part V of this opinion.

As stated, the powers of the Federation and the Provinces come from His Majesty. The rights and privileges of the Rulers exist by reason of their recognized sovereign status and their agreements and relations with His Majesty and His Majesty's Government of India. When His Majesty accepts an Instrument of Accession and thereby admits the Indian State to membership in the Federation, he agrees with the Ruler that in the exercise of those powers which he has transferred to the Federation and to the Provinces, the rights and privileges of the Rulers which he has recognized shall not be infringed and that such agreement is recognized by the Federation.

It is for that reason that the Additional List must be in the Instrument of Accession, because the Instrument of Accession is the Law or Constitution which governs the relations of the Indian State with the Federation and its units.

The intention to preserve the rights and privileges of the Ruler by his Instrument of Accession appears affirmatively in the scheme of the Act and it remains to examine whether there are any negative provisions in the Act which would prohibit the safeguarding of the Ruler's rights and privileges.

PART III.

THE LEGAL CONSTRUCTION OF SEC. 6 (2) OF THE GOVERNMENT OF INDIA ACT, 1935.

Section 6 (2) of the Act provides:

> "An Instrument of Accession shall specify the matters "which the Ruler accepts as matters with respect to which "the Federal Legislature may make laws for his State, and "the limitations, if any, to which the power of the Federal "Legislature to make laws for his State, and the exercise of "the executive authority of the Federation in his State, are "respectively to be subject."

This section is not prohibitive, it is permissive. The Federal Legislature is authorised to make laws with respect to any of the matters enumerated in Lists of the Seventh Schedule of the Act.[4]

These subjects cover the entire field of legislative powers with respect to all the units of the Federation, operative throughout the Federation, both within and without the units constituting the Federation.

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4. Govt. of India Act, 1935 Sec. 100 (1) (2) (4).

The States are expected to accept a substantial number of the items in the Federal Legislative List as applicable to their respective States.

A difference of opinion has arisen as to the effect of acceptance of these items. There are two views:

A liberal construction based upon the nature of the items and the character of the legislative powers and the nature of the subject matter, is that the section authorizes the Federal Legislature to enact Federal Laws which are applicable to the State, which may affect the State as a unit in the Federation, and a restricted or narrow construction to the effect that the only legislation authorized is that which operates or takes effect within the territorial or geographical boundaries of the State.

From this narrow construction, it is argued, it follows that the limitations and reservations with respect to the rights and privileges of the Rulers may only be made with respect to matters operative only within the boundaries of his State.

The Instrument of Accession it is contended therefore may not include any provision to protect the recognized existing rights enjoyed by the Ruler outside his State in British India, although the Act has conferred powers on the Federation and the Provinces which, if exercised, may infringe or destroy such rights.

This contention is inconsistent with the scheme of the Act which conforms to the understanding that, although no new rights and privileges were to be granted, all existing rights and privileges were to be reserved by limitations in the Instrument of Accession on the legislative and executive authority of the Federation.

This narrow view of the effect of Sec. 6 (2) of the Act is due to an erroneous construction of the meaning of the words: "for his State".

(*a*) *The meaning of the word "for his State".*

The construction that the words "for his State" mean acts to be performed only within the territorial, that is, geographical limits of his State, is the reason given for not including in his Instrument of Accession all the rights and privileges enjoyed by the Ruler.

This narrow construction is not consistent with the obvious and necessary meaning of the same words in the same section whereby powers are conferred on the Federation.

The Ruler is, by this section, required to specify in his Instrument of Accession the matters with respect to which the Federal Legislature *may make laws* "for his State". The method proposed is that the Rulers specify in the First Schedule the items of the Federal Legislative List which they accept as matters with respect to which the Federal Legislature may make laws "for his State".

An examination of the 59 items of the Federal Legislative List shows that none of them are to be performed exclusively within his State. Take at random: His Majesty's naval, military and air forces; naval, military and air force works; major ports and port quarantine; pilgrimages to places beyond India; libraries, museums, memorials and Universities in British India.

External affairs; extradition including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India; currency, coinage and legal tender; Public debt; posts, telegraphs, telephones, wireless, broadcasting; Federal Public Services and pensions; Federal Railways, Maritime shipping and navigation including shipping and navigation on tidal waters; admiralty jurisdiction;

Fishing and fisheries beyond territorial waters; air navigation; lighthouses; carriage of passengers and goods by sea or by air; copyright; inventions, trade-marks; checks, bills of exchange, promissory notes; fire-arms, amunition; corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that States;

The Law of Insurance, excepts as respects insurance undertaken by a Federated State; banking, other than corporations owned or controlled by a Federated State and carrying on business only within that State; extension of the jurisdiction of members of a Police force belonging to any unit to railway areas outside that unit; punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature; duties of customs, including export duties.

These are among the matters which the Ruler is expected to accept "as matters with respect to which the Federal Legislature *may make laws* for his State".

In all these matters the State, as a unit in the Federation, is interested but certainly the laws with respect to many of them cannot operate wholly within the territorial boundaries of the State and some of them would operate wholly in British India or without the State.

These surely are laws "for his State" in a broad sense. The Ruler accepts the items in their broad purport, to apply to his State and to be performed wherever the nature of the items requires performance.

Whatever scope is given to the words "for his State" in authorizing Federal power, must also be given to the same words in limiting that power.

The Instrument of Accession shall specify the matters with respect to which the Federal Legislature "may make laws for his State". The limitations which the Ruler is authorized to make are described in the same words "for his State".

The rules of statutory construction require that the same words in the same section shall be given a like meaning. It is therefore clear that the limitation may be as broad as the power and will be operative wherever the power may be exercised, whether within or without the State.

Any other construction is unworkable.

Even those who have accepted the narrow meaning have found it necessary to extend the kind of laws included in the words "for his State" to "laws with no territorial ambit such as laws merely "prescribing the proportions in which Federal funds are to be distributed". The no "territorial ambit" idea, if extended to the items of the Federal Legislative List, in effect nullifies the narrow construction put upon the words "for his State".

This simple solution requires no obscure legal hair-splitting for the reason that where the power is given in the First Schedule annexed to the Instrument of Accession, the scope of the limitation is necessarily co-extensive with the power.

(b) The reservations of rights and privileges which the Ruler may make are not restricted to the limitations specified pursuant to Sec. 6 (2).

This section is not the only authorization in the Act to make reservations

Section 6 (2) is not exclusive. The Instrument of Accession may contain any limitation consistent with the scheme of the Act and acceptable to His Majesty.

It is significant that in the lucid discussion of the reservations which may be made by the Rulers in the Report of the Joint Committee on Indian Constitutional Reform, there is no intimation that the rights and privileges which the Rulers may reserve must be exercised solely within the State territory, but the test is whether such rights are established by treaty or usage, and relate to matters which will be the concern of the Federation. The Report says:

> "We do not doubt that there are States which will be "able to make out a good case for the exception or reserva- "tion of certain subjects, some by reason of existing treaty "rights, others because they have long enjoyed special privi- "leges (as for example in connection with postal arrangements, "and even currency or coinage) in matters which will hence- "forward be the concern of the Federation." [5]

It is with regard to "matters which will henceforward be the concern of the Federation," that reservations are to be made, that is, with respect to matters which the Federation may by reason of its powers infringe wherever that may be, within or without the State.

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5. Vol. I, Part I, Report, Sec. 156, p. 87.

It is clear that the Joint Committee recognized that the Instrument of Accession is controlling.

The Joint Committee states:

> "It is proposed that the Ruler of a State shall signify "to the Crown his willingness to accede to the Federation by "executing an Instrument of Accession; and this Instrument "(whatever form it may take) will, we assume, enable the "powers and jurisdiction of the Ruler, in respect of those "matters which he has agreed to recognize as Federal subjects, "to be exercised by the Federal authorities brought into ex- "istence by the Constitution Act; that is to say, the Governor- "General, the Federal Legislature, and the Federal Court, but "strictly within the limits defined by the Instrument of Accession." [6]

The point in this quotation which deserve special notice is that the powers and Jurisdiction of the Federal authorities are to be exercised "strictly within the limits defined by the Instrument of Accession".

And again the Report states:

> "As regards the States which have acceded to the Federa- "tion, the Federal Jurisdiction will extend to them only in "respect of those matters which the Ruler of the State has "agreed in his Instrument of Accession to accept as Federal." [7]

And further the Report states in reference to the Executive power and authority of the Federation:

> "In relation to a State which is a member of the Federa- "tion the Executive authority will only extend to such matters "as the Ruler has accepted as falling within the Federal sphere "by his Instrument of Accession."

The intent expressed in the Report has been made effective by the provisions of the Act which clearly authorize the Ruler in his Instrument of Accession to limit the exercise of the functions conferred by the Act in their application to his State.

The Act provides that the functions vested in the Federal authorities shall be exercised in relation to his State "by virtue of the Ruler's Instrument of Accession", but "subject always to the terms thereof." [9]

The Ruler may specify the limitations to which the power of the Federal Legislature and the exercise of Executive authority "are respectively to be subject." [10] and "the provisions of this Act shall, in relation to the State, have "effect subject to the provisions of the Instrument." [11]

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6. Vol. I, Part 1, Report, Sec. 155, p. 86.
7. Vol. I. Part I, Report, Sec. 159, p. 89.
8. Vol. I, Part I, Report, Sec. 165, p. 92.
9. Govt. of India Act, 1935, Sec. 6(1) (a).
10. " " " " Sec. 6(2).
11. " " " " Sec. 6(4).

The exercise of the Executive authority of the Federation "in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State." [12] and "noth-"ing in this Act shall be construed as empowering the Federal Legis-"lature to make laws for a Federated State otherwise than in accordance "with the Instrument of Accession of that State and any limitations "contained therein." [13]

The rights and privileges of Indian States which do not accede to the Federation will be continued under the protection of the Crown. But the moment an Indian State accedes, it finds itself in quite a different situation. In acceding it has done so with the intent that "*the provisions of this Act* shall, in relation to the State, have effect "subject to the provisions of the Instrument." [14]

The provisions of the Act include the power and jurisdiction to infringe the rights and, therefore, the rights must be reserved in the Instrument of Accession.

Where the rights are enjoyed or where the action may take place which interferes with the right is immaterial if the Federation or a Province has been given powers which it may exercise to interfere with the right.

The powers and authority conferred upon the Federation and the Provinces were necessarily stated in the Government of India Act in general terms applicable to their jurisdictions and the reservations are no limitation upon those powers and authority exercised with respect to British India.

In the discussions in Indian States, the Special Representatives of His Excellency the Viceroy said :

> "Limitations imposed by the Instrument on the executive "and legislative power of the Federation could only be limita-"tions on the exercise of that authority or power in or for "the Federating State. They could not be limitations on the "executive authority of the Federation in British India, or in "any other State, or on the legislative power of the Federation "for British India or any other State, *i. e.*, they could not "cut down the powers which the Federation would have "possessed if the State had not federated at all;"

The reservation of the rights and privileges of the Rulers in their Instruments of Accession is not a curtailment of the executive or legislative authority of the Federation or of the Provinces in British India, neither does it cut down the powers which the Federation would have possessed if the State had not federated.

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12. Govt. of India Act, 1935, Sec. 8(1) (ii).
13. „ „ „ „ Sec. 101.
14. „ „ „ „ Sec. 6(1) (a).

A misconception in applying the principle stated by the Special Representatives has been due to a failure to recognize that the Instrument of Accession and Schedules annexed impose no limitation upon the powers conferred by the Government of India Act on the Federation and the Provinces to legislate generally in and for their respective jurisdictions.

The effect of all these limitations and reservations is not to encroach upon the powers of British India, but to preserve the Ruler's rights and privileges heretofore recognized by His Majesty's Government of India.

The reservations provide: *(a)* that the powers *conferred by the State* on the Federation, with respect to items accepted by the Ruler pursuant to Section 6 (2) of the Act, shall be subject to limitations co-extensive with the powers granted, as set forth in the First Schedule of the Instrument of Accession, and *(b)*, that the exercise of powers *conferred by the Act* on the Federation and the Provinces, not accepted by the Ruler as applicable to his State, shall not apply to the existing rights and privileges enjoyed in the Third Schedule of the Instrument of Accession.

This brings us to an examination of the further argument that the rights and privileges enumerated in British India may not be reserved because they are extra-territorial.

PART IV.

THE RIGHTS AND PRIVILEGES RESERVED BY THE RULERS IN THE FIRST AND THIRD SCHEDULES ARE NOT EXTRA-TERRITORIAL RIGHTS IN A LEGAL SENSE AND THERE IS NOTHING IN THE LAW OF EXTRA-TERRITORIALITY WHICH PREVENTS THE RULERS FROM RESERVING THESE RIGHTS AND PRIVILEGES IN THEIR INSTRUMENTS OF ACCESSION.

We have all used the words "extra-territorial rights" as a convenient term to describe the rights and privileges which the Rulers enjoy in British India.

An examination of the rights and privileges specified in the limitations and reservations proposed by the Rulers in the Schedules of their Instruments of Accession, shows that none of them are extra-territorial in a legal sense.

Certain writers distinguish the terms "exterritoriality" and "extra-territoriality", while others use them as identical.[15]

But whether the term exterritoriality, which undoubtedly has its origin in the French *exterritorialite*, or extra-territoriality is used, all the authorities confine its application to three categories.

The following survey gives the meaning of "extra-territoriality" as defined by eminent writers on International Law and the Courts, in each of the three categories.

The First Category.

This category is defined as the application by the Courts in one country of the laws of a foreign country.

It is also known as the doctrine of the renvoi.[16]

Extra-territoriality in this category is defined by Dicey as "the rules about the choice of Law for the guidance of Judges". He gives as an example the application of the Law of England in determining whether a will was properly executed when made in France by a testator who was domiciled in England.[17]

These rules have attained universal application by the courts of all civilized countries. The courts of India constantly apply this doctrine in the adjudication of cases, and undoubtedly would continue to do so after Federation.

An application of this rule is found in the recognition of Hindu and Moslem law in British India.[18]

In the case of Abd-ul-Messih *v.* Farra, the Court said:

> "By the law established in India, the members of certain "castes and creeds are, in many important respects, governed "by their own peculiar rules and customs, so that an Indian "domicile of succession may involve the application of Hindu "or Mohamedan law."[19]

This first category, in which the word "extra-territorial" is used in the special sense of the rules whereby, in certain cases, foreign law is recognized by a trial court, has no application. It applies to legal doctrines and laws of foreign States—not to the rights and privileges under consideration and therefore may be dismissed from further consideration.

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15. Sir Francis Piggott-Exterr. (New edition, 1907), p. 2; see also Halleck International Law (4th edition.)

16. "A digest of the Law of England with reference to the Conflict of Laws" (4th edition). A. V. Dicey K. C. Appendix note 1, p. 811; "Notes on the doctrine of "renvoi" by Bate and Westlake, Chap. 11.

17. Dicey, pp. 4 and 5.

18 Westlake Priv. Int. Law (4th edition), pp. 312—313.

19 13 App. Cas. 431, 440, 5 ERC 772.

The Second Category.

The term "extra-territorial" is also used especially in the form "exterritorial", to indicate the privileges of Sovereigns and their ambassadors in foreign countries.[20]

The nature of the term exterritoriality, in this category, is best understood by recalling the "personality" of law as distinguished from "territoriality".[21]

It has its origin in Roman times preceding the Middle-Ages[22] and was found in Rome originally in the Jus Quiritium and later in the Jus Civile.[23]

Dicey, in his "Conflict of Laws", states the rule as an extra-territorial privilege "in respect of Person".[24]

These extraterritorial personal privileges of the representatives of Sovereigns abroad were recognized by Parliament in the Diplomatic Privileges Act, 1708.[25]

The principle upon which this personal immunity was based, rests on a fiction commonly called the fiction of extra-territoriality that, while abroad, the Sovereign or his Minister was still in his own country.[26]

The name of exterritoriality, derived from that fiction, has become attached to the whole class of exceptions from rules of jurisdiction and personal privileges enjoyed by Sovereigns.[27]

Such are the rights and privileges which the Ruler enjoys outside his State by reason of his Sovereign status, and they are among the rights and dignities which the Governors and Governor-General in the exercise of their special responsiblities are to protect.

They will be discussed further as "Crown Rights" in part V of this opinion.

They are in a legal sense extra-territorial, but they are not within the Federal sphere and therefore, are not among the rights and privileges set forth in the schedules of the instrument of Accession.

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20 Sir Francis Piggott, Exterr. (New edition, 1907), p. 2.

21 I Journ. Int. L. p. 469.

22 Ross v. McIntyre, 140 U. S. 453.

23 Sohm Rom. L. (3rd edition, 1907), s. 13.

24 Dicey (4th edition), pp. 206—207, Rule 52.

25 St. 7 and c. 12, s. 3; See also Westlake's Priv. Int. Law (6th edition), p. 256.

26. Maine Int. L. pp. 85, 86; Foote's Priv. Int. L. Based on the decisions of the English Courts (5th ed.) p. 205; See Wheaton Int. Law (1904); Lord Hobhouse in Sec. of State for Foreign Affairs v. Charlesworth (1901) A. C. 373, 383.

27. Mighell v. Sultan of Johore (1894) 1 Q. B. (C. A.) 149; Musurus Bey v. Gadban (1894) 1 Q. B. 533. Compare Duke of Brunswick v. King of Hanover (1844), 6 Beav. 1; (1848), 2 H. L. C. 1; Wadsworth v. Queen of Spain (1851), 17 Q. B. 171. 20 L. J. Q. B. 488; Munden v. Duke of Brunswick (1847), 10 Q. B. 656; 16 L. J. Q. B. 300; The Jassy (1906), p. 270; Sthatham v. Statham (1912), p. 92; Duff Development Co. v. Government of Kelantan (1924), A. C. 797.

The Third Category.

The conception of jurisdiction as personal, which had formed the basis of the extra-territorial rights and which had continued in Italy, Spain, France and England during the Middle-Ages, underwent a change and finally disappeared, except as it survived in the immunities enjoyed by Sovereigns and diplomatic representatives abroad, which rest upon courtesy. [28]

The nations of the West then extended extra-territorial jurisdiction by treaty to a new category.

In an early stage, consuls with judicial power were sent to foreign jurisdictions to decide matters arising among the subjects of the State residing in foreign countries. [29]

The judicial powers of the consuls in turn gradually disappeared and in their place Courts with extraterritorial powers were established by treaties.

In 1613 the East India Company's ship Clove established at Hirado in Japan a factory and extraterritorial rights were granted, that is, "the right of the officials of the factory to punish their own men according to their own laws for offences committed on Japanese soil." [30]

One form of these extra-territorial rights was known as capitulations. [31]

Dicey describes this type of extra-territoriality as follows:

> "The subjects of a State are, under certain circumstances "when in fact not residing within the limits of such State, "considered by a fiction of law to be resident there, and to "subject to its laws. This fiction is termed "exterritoriality." [32]

He gives the following example:

> "The effect of exterritoriality as regards "marriage is, that "where it applies, a marriage is valid though not celebrated "according to the ordinary local forms of the place of cele-"bration, and is treated as though it had been in fact cele-"brated in the country in which it is supposed by a fiction of "law to have been solemnized." [33]

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28. Moore Int. L., pp. 85, 86; Piggott Exterr. (new ed. 1907), p. 3.

29. Borel Origin Funct. Consuls, c. 1; Imperial Japanese Govt. Peninsular, etc. Steam Nav. Co. (1895), A. C. 644—654.

30. Piggott Exterr. (new ed. 1907), p. 174; Longford The Story of Old Japan (1910), pp. 293—294.

31. First granted to England in 1579, established in Turkey in 1675, confirmed by treaty in 1809 and in China in 1856; Van Dyck Capitulations Ottoman Empire, p. 17; so also International Mixed Courts exercise extraterritorial jurisdiction, such as those in Cairo, Egypt and Shanghai, China.

32. Dicey, pp. 692, 694.

33. Pertreis v. Tondear (1790), 1 Hagg. Cons. 136; Lautour v. Teesdale (1816), 8 Taunt. 830; R. v. Brampton (1808), 10 East, 282; Higgs v. Higgs (1920) 36 T. L. R. 690.

So also an act done on board a ship on the high seas is governed by the law of the country to which the ship belong, *e.g.*, England, France or Italy, [34] the ship being deemed part of the country to which the ship belongs, and is in general valid, if good by the law of the ship's country. [35]

The following provision in the Foreign Jurisdiction Act (1890) clearly indicates the nature of extra-territorial rights.

> "Thereupon those enactments shall, to the extent of that "jurisdiction, operate as if that country were a British posses- "sion and as if Her Majesty in Council were the legislature "of that possession." [36]

The term is now generally used to indicate jurisdiction exercised by a nation in other countries; to describe the act by which a State extends its jurisdiction beyond its own boundaries into the territory of another State, and exercises the same over its nationals who, for the time being, may be sojourning in the territory of the other State. [37]

From the foregoing examination of the legal definition and application of "extra-territoriality" of this type, it appears that:

(1) The exercise of jurisdiction by a country over its own nationals according to its own laws in a foreign country is extra-territoriality, and

(2) The right of a national to have the laws of his own country applied in a foreign county as if he were at home is an extra-territorial right. [38]

It is clear that the rights and privileges of the Rulers reserved in their Schedules are not within this definition.

The law of extra-territoriality is not applicable.

"Extraterritoriality" does not apply under the first category to the rights and privileges under discussion, as they do not arise from the application of State Law in British India under the rules known as "renvoi".

Neither is the term extra-territoriality applicable under the third category, as the Ruler is not planting in British India any oasis of Indian State law where he exercises rights according to the law of his State.

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34. Dicey, p. 729.

35. Dicey, p. 694. Foreign Marriage Act, 1892, 55 and 56 Vict, c. 23 and Orders in Council, Nov. 23, 1913 (S. R. O. No. 1270), Feb. 6, 1925 (S. R. O. No. 92).

36. Foreign Jurisd. Act (1890) para. 5 (1) (2). Certain Acts of Parliament have been given extraterritorial validity throughout British Dominions, e.g., Bankruptcy Act, 1914 (4 & 5 Geo. V, c. 59), Lunacy Act, 1890 (53-54 Vict. c. 5 S. 110; 8 Edw. 7, c. 47), Trustee Act. 1925 (15 Geo. V. c. 19. S. 56; See Westlake Chap. VI, pp. 162 to 188; Phillmore s. s. 765 to 779; Foote, pp. 265—266, 333—334; The enjoyment of extraterritorial rights by British subjects abroad is governed by Acts of Parliament; Foreign Jurisdiction Acts 1843, St. 6 and 7 Vict., c. 94; and Foreign Jurisdiction Act 1890, St. 53 and 54 Vict., c. 37; and Orders in Council authorized by the Acts; China and Corea Order in Council, Oct. 24, 1904.

37. Halsbury's Laws of England (2nd edition), Vol. 6, pp 500 and seq. Bouviers Law Dictionary, Vol. I, p. 1174; Wilfrey J. in re Allen I Am. Journ, Int. Law, p. 1032.

38. Dicey, Conflict of Laws (4th edition), p. 71,

A law operates extra-territorially when its operation is upon persons beyond the limits of the enacting State. There is no such operation here. There is no proposal that a law enacted by an Indian State should be effective in a Province.

None of the rights and privileges of the Rulers enumerated in the Schedules are extra-territorial rights.

Much of the misconception of the effect of the reservations is due to a misconception of the legal meaning of that term.

PART V.

CLASSES OF RIGHTS AND PRIVILEGES.

The rights and privileges of the Rulers may for the purpose of this discussion be divided into three classes:

A—Rights and privileges which are outside the Federal sphere.

B—Rights and privileges relating to the items in the Federal Legislative List. These should be protected by limitations to those items which are *accepted* by the Ruler in "Schedule I" annexed to the Instrument of Accession.

If the right or privilege relates to an item which is not accepted, the reservation would fall into "Class C"

C—Other rights and privileges which do not relate to the items accepted in "Schedule I" and which are enumerated in the Third Schedule of Additional Rights.

Class A. Rights and Privileges outside the Federal Sphere called "Crown Rights."

These rights concern matters based upon treaties, Sanads and agreement with His Majesty, which are not within the Federal sphere. They are not the concern of either the Federation or the Provinces.

As these rights are based upon relations between the Ruler and His Majesty, they have been termed for convenient reference "Crown Rights". Any controversies concerning them would be in the province of His Majesty's Reprerentative for the exercise of the functions of the Crown in its relations with Indian States. [39]

The obligation of the Crown to respect them continues after the establishment of Federation. The Act provides:

> "Subject in the case of a Federated State to the provi-
> "sions of the Instrument of Accession of that State, nothing
> "in this Act affects the rights and obligations of the Crown
> "in relation to any Indian State." [40]

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39. Government of India Act, 1935, Sec. 2 (1).
40. " " " 1935, Sec. 285.

This Section of the Act, entitled: "Savings for rights and obli-"gations of the Crown in its relation with 'Indian States', *qualifies* "the provision that 'nothing in this Act affects the rights and obliga-"tions of the Crown in relation to any Indian State", by the phrase: "subject in the case of a Federated State to the provisions of the "Instrument of Accession of that State."

Clause I of the Instrument of Accession contains a declaration required by the Act, that the Ruler accedes to the Federation with the intent that the Federal Authorities shall exercise in relation to his State such functions as may be *vested in them by or under the Act.* [41]

As the Act confers broad legislative powers and executive authority upon the Federal authorities, the Instrument of Accession should contain a clause *negativing any waiver* of the obligations of the Crown by reason of the Rulers' Instrument of Accession.

There would be no need for this clause, were His Majesty continuing to exercise all the functions of Government in direct relation with the Rulers. The Act, however, transfers the exercise of certain powers heretofore exercised by His Majesty to the Federal authorities, and the Ruler in his Instrument of Accession accepts the exercise of these functions "vested in them by or under the Act".

The special responsibilities of the Governor-General and the Governors [42] are not to be substituted for the obligations of the Crown, but in aid of them. The Ruler, by acceding, associates his State with the Provinces as a unit in the Federation and accepts the jurisdiction of the Federal Authorities "by virtue of his Instrument of Accession but "subject always to the terms thereof".

One of these terms should be that he does not substitute Federal obligations for Crown obligations.

It is, therefore, proposed to insert in the Ruler's Instrument of Accession a clause providing that his accession to the Federation and this Instrument shall not affect or be deemed *a waiver of* the obligations of the Crown with respect to the rights and privileges of the Ruler as a Sovereign and in his relations with the Crown.

To safeguard these "Crown Rights", the following clause for insertion in the Standard Form Instrument of Accession, to be numbered "Clause 12", is suggested for consideration:

12. "The accession of this State to the Federation and this "Instrument of Accession shall not affect or be deemed a waiver "of the obligations of the Crown to protect the rights of this "State and the rights and dignity of the Ruler thereof and

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41. Government of India Act, 1935, Sec. 6 (1).
42. " " " 1935, Sec. 12 (1) (g); 52 (1) (f).

"to defend and protect the Ruler of this State, his Consorts, "the Heir-apparent and the Ruling Dynasty of this State and its "territorial integrity from external aggression or internal disorder."

As all the Crown rights, without listing them, are protected by the proposed Clause 12 to be inserted in the Instrument of Accession, it is not insisted that the List of such rights should be annexed to the Instrument.

A Crown List has, however, been requested by the Governor-General for his information. Such a list would be of assistance to the Governor-General and the Governors in the exercise of their special responsibilities to protect the rights of the State and the rights and dignity of the Ruler.

The Crown List should include the rights and dignities of the Ruler due his Sovereign status recognized in British India, and all rights and privileges arising out of treaties and agreements with the Crown or established practice, concerning matters *outside the Federal sphere.*

The Crown List should conclude with the following clause:

"The enumeration in this Schedule of certain rights and "privileges is not intended to be comprehensive and shall not "be construed to deny or as a limitation upon or in derogation "of any other rights and privileges of the Ruler of this State."

Class B. Rights and privileges relating to the items in the Federal Legislative List.

In compliance with the requirement in the Act [43] the Ruler in Clause 5 of the Revised Draft Instrument of Accession [44] "accepts "the matters specified in the First Schedule thereto as the matters "with respect to which the Federal Legislature may make laws for "his State."

The Federal Legislative powers are contained in the Federal Legislative List annexed to the Government of India Act. [45] The Ruler, therefore, indicates in the First Schedule the items in the Federal Legislative List which he accepts. By such acceptance the Ruler confers on the Federal Legislature powers in respect to items accepted.

Where the full exercise of the powers thus conferred would infringe the recognized rights and privileges of the Ruler, he is authorized by the Act to specify limitations of the powers conferred.

The Ruler should reserve by his limitations all rights and privileges which may be infringed by the exercise of any power conferred. It follows that all limitations with respect to any of the items

43. Government of India Act. 1935. Sec. 6(2).
44. Rep. of the Constitutional Com. of the Chamber of Princes Annexure IV.
45. Government of India Act. 1935, Seventh Schedule. List I.

in the Federal Legislative List accepted by the Ruler should be included in the First Schedule. This would apply equally to any item in the Concurrent Legislative List,[46] if accepted by the Ruler.

As the right to limit is co-extensive with the power conferred, the reservations and limitations may cover any exercise of the Federal power whether within or without the territorial limits of the State.

Each State will examine the rights and privileges it enjoys and which it desires to preserve, and if it relates to an item in the Federal Legislative List which it has accepted as applicable to the State, it will reserve the right or privilege as a limitation to that item in the First Schedule annexed to its Instrument of Accession.

Reservations would, therefore, be made of privileges relating to customs, under items 44; relating to customs cordons under item 19; relating to postal facilities, post office conventions and free service stamps, under item 7; relating to participation in excise duties levied on motor spirits and matches, under item 45; relating to the maintenance of armed forces for the internal safety of the State, under item 1; relating to the importation of arms and ammunition for the the Ruler's personal use or that of State troops and exemption from licenses under the Arms Act, and to carrying fire-arms and ammunition by the Ruler, member of his family and Sardars on tour in other units of the Federation, under item 29; relating to telephones, telegraphs, wireless and broadcasting, under item 7; relating to air navigation, under item 24; relating to salt, under item 47; and relating to railways, under item 20.

For example, the Right of the Ruler and members of his family, chiefs, nobles and officials to possess, import and carry on journeys fire-arms and ammunition would be reserved by a limitation to item 29 entitled: "Arms, fire-arms; ammunition" of the Federal Legislative List; and the right to so import free of customs duty would be reserved by a limitation to item 44, entitled: "Duties of Customs".

Recommendations as to limitations to items in the Federal Legislative List will be found in the Report of the "Constitutional Committee of the Chamber of Princes".

Although these recommendations do not cover all limitations, they are useful as examples.

Class C. Additional Rights and Privileges.

Class C refers to rights and privileges which may be interfered with by reason of the powers conferred by the Act upon the Federation and the Provinces.

There are certain privileges and rights which the Ruler may protect but which are not properly classed as limitations in the First

46. Government of India Act, 1935. Seventh Schedule, List III.

Schedule annexed to the Instrument of Accession, for the reason that limitations in the First Schedule apply only with respect to items in the Federal and Concurrent Legislative Lists accepted by the Rulers.

It has been understood that it is the Government policy with respect to rights and privileges of a Ruler, to maintain the *status quo,* that is, no additional rights, privileges or immunities will be granted upon the establishment of the Federation, but all existing rights, privileges and immunities will be continued. As there are a number of such rights which are within the Federal sphere but do not fall within the First Schedule, it becomes necessary to provide an additional Schedule.

There appears to be a confusion as to the distinction between the class of rights which are by limitation reserved in the First Schedule and the class of rights which it is proposed to reserve by limitation in a Third Schedule of additional rights. The distinction is not based on the limitation of Federal powers outside the territorial limits of the State. The distinction between the two classes is this: in the First Schedule, which has to do with the Federal Legislative List, rights may only be reserved by limitations with respect to matters that are specified by the Ruler as accepted by him *in* that list. The Third Schedule does not include rights with respect to the items accepted by the Ruler, but other additional rights which he now enjoys but which, as they are not within the matters specified in the Federal Legislative List, are placed in an additional Schedule.

They are called "Additional Rights" merely because they are rights in addition to those enumerated in the First Schedule.

The safeguarding of them should be assured in the Instrument of Accession just as effectively as the rights and privileges mentioned in the First Schedule.

There has never been in discussions or Governmental Reports any differentiation between the so-called "additional rights" and those enumerated in the First Schedule, and the same assurances have been given that the enjoyment of them by the Rulers is to continue uninterrupted by the Rulers' accession to the Federation.

The reason that this additional schedule is required is that, in the exercise of the functions conferred by the Act and authorized by the Ruler in Clause (1) of the draft Instrument, [47] pursuant to Section 6 (1) *(a)* of the Act, the Federation may destroy or interfere with such additional rights, unless the exercise of the powers conferred by the Act is rendered inapplicable by the Instrument of Accession.

Whether a right or privilege should be contained in the additional list, is to be determined by the inquiry whether authority has been given to the Federation or to a Province to infringe or destroy such right. Where such power or authority exists, it is necessary that there

47. Report of the Constitutional Committee of the Chamber of Princes, Annexure IV.

should be a clause in the Instrument of Accession that the exercise of such power shall be inapplicable with respect to a right or privilege of the Ruler which existed before Federation by reason of established practice or by reason of treaties or agreements with the Crown or with His Majesty's Government, and which it is the intention shall continue in the future

The Instrument should not impose upon the Federation or the Provinces what they shall do, or place any restriction upon the laws they may desire to enact in reference to their own territory and their own subjects. A clause should provide that the authority of the Federation and the Provinces as vested in them by the Act, shall not be used to infringe the rights of the Rulers heretofore recognized by His Majesty's Government in British India.

Therefore it is proposed to add a clause to the Instrument of Accession, providing that the exercise of any legislative power or executive authority by the Federation or by a Province shall not apply to a Federated State in respect to the rights and privileges set forth in the Third Schedule annexed to the Instrument of Accession.

The following clause for insertion in the standard form Instrument of Accession and numbered "Clause 11", is suggested for consideration:

11. "I have set out in the Third Schedule to this Instrument "certain rights and privileges appertaining to this State or to "the Ruler thereof and nothing in this Instrument is intended "or shall be deemed to affect those rights and privileges or "any of them and no act of any Federal or Provincial Autho-"rity in the exercise or purported exercise of its functions or "in any way in derogation of or contravention to any of such "rights and privileges, shall be applicable to this State or the "Ruler thereof."

It will be noted that the clause suggested is a modification of the form suggested by the Implications Committee in its Report, and meets the objection that the clause there proposed was a limitation of the power of another Governmental unit.

The above clause does not restrict the powers of the Federal or Provincial Legislative or Executive authorities in their respective jurisdictions. It provides for a continuance of the immunities enjoyed by the Rulers by providing that any act in derogation of their existing rights and privileges *shall not apply to them.*

It will be noted that, in the clause suggested above, there is no limitatoin of power but an agreement as to application. His Majesty, by accepting the Instrument of Accession, acknowledges on behalf of the Federation and the Provincial units, that laws in derogation of the rights and privileges which the Rulers have by agreement with His Majesty enjoyed in British India shall continue, and therefore

any power which the Federal or Provincial authorities are by the Act authorized to exercise shall not, if in derogation of those rights, be applicable.

The method suggested is convenient. It overcomes the objection that it would be most cumbersome if every Act of the Federal and Provincial Legislatures had to append a list of exceptions, reservations and limitations with respect to the numerous Indian States.

It would be impracticable, if not impossible, for the Governor-General and Governors to be continuously on the watch to see that the General Laws of the Federal and Provincial Legislatures did not infringe the rights and privileges of the Rulers.

By the method suggested there is no necessity for special exceptions in the laws enacted by the Federation or a province to protect the Ruler in these matters. The Legislatures may pass laws on any or all of these subjects without mention of any Ruler's rights or privileges or even reference to his State. But the State which enjoys a right infringed by such a law, is nevertheless protected because in its Instrument of Accession, which is the fundamental law governing the relation of the State as a unit of the Federation, it is provided that such a law is not applicable with respect to the subject specified in the Third Schedule, that is, the right or privilege enjoyed by the Ruler.

The legal adviser of the Ruler will examine the unaccepted items of the Federal Legislative List and the items of the Provincial and Concurrent Legislative Lists in the Seventh Schedule of the Act [48], and if he discovers an item in any of these lists relating to a right or privilege of the State, he will reserve it in the Third Schedule of Additional Rights annexed to his Instrument of Accession.

As the laws enacted by the Federation or by the Provinces are not to be applicable in respect to the existing rights of a Ruler, it is appropriate that the Third Schedule should state the subject, which is to be inapplicable to State, in the terms of the Act conferring the power to legislate.

For example, the right of the Ruler with respect to motor vehicles would be reserved by a clause in the Third Schedule as follows:

> "The rights and privileges of the Ruler, members of his "family and suite with respect to mechanically propelled vehi-"cles, including exemption of the Ruler, members of his "family and suite, from the operation of the Indian "Motor Vehicles Act, and the Rules made thereunder and the "right to reciprocity in matters of licensing and registration "in respect to Motor Vehicles, as provided by the Motor "Vehicles Native States' Rules, 1916, and the Government of "India Notification No. 627, dated the 6th of July, 1916."

48. Lists I, II and III of the Seventh Schedule of the Government of India Act, 1935.

Such a clause would exempt the Ruler from the operation of the Indian Motor Vehicles Act and the Rules made pursuant to the Act, and from any future legislation by the Federal Legislature or Provincial Legislatures pursuant to Item 20 of the Concurrent Legislative List in so far as he has existing rights or privileges under the Rules and Notification of 1916. [49]

It is not possible in this opinion to furnish a complete list which will cover all the additional rights of all the States. An examination of a number of lists submitted indicates some confusion as to the schedules in which the rights should be placed. Rights which should be reserved by limitations in the First Schedule have been in some cases omitted or placed in the Third Schedule; rights which should be included in the Crown List are found in the Schedules, and others which should be in the Schedules are placed in the Crown List — and many rights have been overlooked and omitted altogether.

The principles of classification discussed in this opinion are suggested as aids in preparing the Crown List and the First and Third Schedules of the Instrument of Accession. Their preparation requires the greatest care.

Each Instrument of Accession and the Schedules annexed should be carefully examined to assure that all the rights and privileges of the Rulers and their States are properly safeguarded.

PART VI.

THE SPECIAL RESPONSIBILITIES GIVEN THE GOVERNOR-GENERAL AND THE GOVERNORS OF PROVINCES BY THE GOVERNMENT OF INDIA ACT ARE NOT A SUFFICIENT PROTECTION TO THE RIGHTS AND PRIVILEGES OF THE RULERS RESERVED IN THE SCHEDULES OF THEIR INSTRUMENTS OF ACCESSION.

One of the special responsibilities of the Governor-General [50] and the Governors [51] is:

> "The protection of the rights of any Indian State, and "the rights and dignity of the Ruler thereof."

The rights and dignity concerning which the Governor-General

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49. The Government Resolutions and Notifications are expressions of policy and therefore have not the binding force of agreements, but they contained rights and privileges which have been recognized by the Government of India and which may be reserved. See Opinion by Judge Wadhams on Railways in Indian States. p. 11.

50. Government of India Act, 1935, Sec. 12 (1) (g).

51. " " " 1935, Sec. 52 (1) (f).

and the Governors have a special responsibility are *not* the rights and privileges specified in the First and Third Schedules of the Instruments of Accession.

Such is clearly the view of the Committee on Constitutional Reform, which states in its Report under the heading "Nature of the Governors' 'special responsibilities'":

> "With regard to (this special responsibility of the "Governor) the 'rights' here referred to must necessarily mean "rights enjoyed by a State in matters *not covered by his "Instrument of Accession*, which may be prejudiced by admi- "nistrative or legislative action in a neighbouring Pro- "vince." [52]

This view is further confirmed in the Report of the Joint Committee on Constitutional Reform under the heading: "Nature of the Governor-General's Special Resposibilities" which states:

> "As regards the protection of the rights of any Indian "State, we have already expressed the view that this special "responsibility only applies where there is a conflict between "rights arising under the Constitution Act and those enjoyed "by a State *outside the Federal Sphere.*" [53]

In this quotation the precise point is made clear.

The rights of the State and the rights and dignity which are a special responsibility of the Governor-General and the Governors are those inherent in the Sovereignty of the Ruler recognised by established usage and custom and rights arising by reason of relations with the Crown under treaties and agreements, with respects to matters outside the Federal Sphere.

The Report of the Constitutional Committee expresses the same view as follows:

> "Section 12 (1) *(g)* of the Government of India Act has "been referred to as affording protection for such rights in the "Governor-General's discretion. Article XV of the Instrument "of Instructions to the Governor-General, however, makes it "clear that protection under Section 12 (1) *(g)* is intended to "cover rights in the Non-Federal sphere."

These rights and dignities "outside the Federal sphere" have been discussed under "Crown Rights" in Class A, Part V, of this opinion, and a new clause has been suggested for insertion in the standard form Instrument of Accession confirming that they will not be affected by accession to the Federation.

There remain for consideration the rights and privileges within

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52 Vol. I, Part I. Report, Sec. 80, p. 45.
53. Vol. I, Part I. Report, Sec. 171, p. 95.

the Federal sphere which, by reason of the powers conferred by the Government of India Act upon the Federation and the Provinces, may be infringed.

The view expressed by the Constitutional Committee is that, as these rights and priviliges are not within the purview of the special responsiblities of the Governor-General and the Governors, they should be afforded other protection. The Report continues :

> "The Committee are not wedded to the form in which "the protection is afforded but share the view expressed by "the Informal Committee of Ministers in their letter to Sir "Bertrand Glancy No. 68 C C dated 21 January, 1937, that "the protection should be legal."

The legal protection desired is afforded by the suggestions contained in this opinion under Classes B and C, Part V, with respect to the First and Third Schedules of the Instrument of Accession.

The Report of the Constitutional Committee proceeds to state that

> "it is felt that the object may be gained by recourse to "agreements, such as those contemplated under Section 204 "(1) *(a) (iii)*, between the Federation and the State which "may specifically be made subject to the jurisdiction of the "Federal Court."

It therefore becomes necessary to examine the extent of the jurisdiction conferred by the Government of India Act on the Federal Court to determine disputes concerning infringement of these rights and privileges within the Federal sphere and enumerated in the First and Third Schedules of the Instruments of Accession.

PART VII.

THE JURISDICTION OF THE FEDERAL COURT WITH RESPECT TO DISPUTES CONCERNING RIGHTS AND PRIVILEGES OF THE RULER.

In the Reports of the Constitutional Committee and the Implications Committee of the Chamber of Princes, the view has been expressed that it is not enough to rely upon the Governor-General's special responsibility under Section 12 (1) *(g)* of the Act, for the protection of the rights and privileges now assured by treaties or agreements which are within the Federal sphere and that the protection should be legal. By legal protection is meant that the Federal Court should have jurisdiction to determine any controversy with respect to such rights.

The Federal Court has jurisdiction in any dispute to which a State is a party, whether with the Federation or a Province or another State, which involves any question on which the existence or extent of a legal right depends, provided it concerns (1) the Interpretation of the Government of India Act, or (2) an Order in Council made under the Act, or (3) the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession, (4) arises under an administrative agreement, (5) concerns some matter with respect to which the Federal Legislature has power to make laws for the State, or (6) arises under an agreement made after the establishment of the Federation with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between a State and the Federation or a Province. [54]

Disputes, therefore, concerning Federal Legislative or Executive authority which would include the applicability to a State of any Federal Law, may be brought before the Federal Court for determination. The provisions with respect to rights and privileges contained in the Instruments of Accession and the Schedules annexed to them, in so far as they relate to Federal Powers, would therefore have the legal protection of the Federal Court.

Although the Government of India Act gives jurisdiction to the Federal Court in the case of a dispute between a State and a Province, that dispute must concern or arise under one of the six items above-named. These items, in which the Federal Court has jurisdiction, contain no mention of disputes concerning the extent of the Legislative or Executive authority vested in a Province. It follows that the Federal Court has not been given jurisdiction in disputes between a State and a Province concerning rights arising under existing agreements with British India which may, pursuant to the powers conferred by the Government of India Act, be infringed by Legislative or Executive Action by a Province.

Every Instrument of Accession accepted by His Majesty, which contained the proposed Clause 11 would render inapplicable any law with respect to the rights and privileges concerning items in the Federal and Concurrent Legislative Lists reserved in the Third Schedule.

It is provided by the Act that

> "All courts shall take judicial notice of every such Instrument of Accession and Acceptance". [55]

Therefore it would be the duty of all courts in the British Provinces to hold any law infringing rights and privileges set forth in the Third Schedule as inapplicable to the Federated State concerned.

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54. Section 204 (1) Government of India Act, 1935; see Report of the Sub-Committee of the Constitution Committee of the Chamber of Princes on Implications, Annexure III entitled "Federal Judiciary."

55. Government of India Act, 1935, Sec. 6 (9).

In cases, however, where the Ruler desires that the Federal Court should have jurisdiction to determine any dispute with a Province concerning rights and privileges arising under agreements with British India, now constituted into Provinces, he should obtain the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, and reach an understanding with the Provincial Government that, after the establishment of the Federation, a new agreement covering such rights or privileges will be made between the State and the Province. These agreements shall expressly provide that the jurisdiction of the Federal Court shall extend to any dispute arising under such agreement. [56]

There is no provision of the Government of India Act, similar to that contained with respect to administrative Agreements under Section 125 of the Act, whereby the Federation or Province may, by the Instrument of Accession, be required to enter into agreements after the establishment of the Federation.

As the authority of the Governor-General and the Governors of Provinces is limited to the authority vested in them by the Act, it is doubtful whether a provision in the Instrument of Accession requiring the making of such agreements, would be consistent with the scheme of the Act, and, therefore, whether His Majesty would accept or even be empowered to accept an Instrument with such a requirement. [57]

There would, however, appear to be no legal objection, where it is considered of vital importance to a Ruler that his legal rights, under agreements with British India or any part thereof, should be determined by the Federal Court, to arrange that disputes concerning such rights shall after the establishment of the Federation be determined by the Federal Court.

It is suggested for consideration that the Ruler may assure the extension of the jurisdiction of the Federal Court to disputes arising under agreements with British India by inserting in his letter transmitting his Instrument of Accession the following paragraph:

> "This Instrument of Accession is made upon the express "understanding that it shall not take effect unless and until "the Federation or the Province (as the case may be) of "(naming the Province) has undertaken to make an agreement "(or agreements) with this State after the establishment of the "Federation, which expressly provides that the jurisdiction of the "Federal Court shall extend to any dispute arising under the "agreements with respect to the following rights and privileges "(naming the agreement, which the Ruler desires should be "within the jurisdiction of the Federal Court)."

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56. Government of India Act, 1935, Sec. 204 (1) *(a) (iii)*.
57. „ „ „ 1935, Sec. 6 (4).

The agreements named would be those relating to the rights and privileges of the Ruler specified in the Third Schedule which may be infringed by the powers conferred by *the Provincial and Concurrent Legislative Lists* only.

Disputes concerning Federal laws are within the jurisdiction of the Federal Court.

The Concurrent List is included for the reason that the Province as well as the Federation may make laws on the subjects itemized in the Concurrent List.

It would not be necessary to include the rights and privileges of the Ruler reserved in the First Schedule, relating to Powers conferred by the Federal Legislative List, as they are within the jurisdiction of the Federal Court and therefore special agreements conferring such jurisdiction are unnecessary.

PART VIII.

CLAUSES RECOMMENDED TO BE ADDED TO THE INSTRUMENT OF ACCESSION.

For the convenience of the Members of the Chamber of Princes, the proposed new clauses for the standard form Instrument of Accession suggested for consideration are again stated as follows:

11. "I have set out in the Third Schedule to this Instrument certain rights and privileges appertaining to this State or to the Ruler thereof and nothing in this Instrument is intended or shall be deemed to affect those rights and privileges or any of them and no act of any Federal or Provincial Authority in the exercise or purported exercise of its functions in any way in derogation of or contravention to any of such rights and privileges, shall be applicable to this State or the Ruler thereof."

Discussion with respect to this clause is contained in Part V. of this Opinion under Class "C."

12. "The accession of this State to the Federation and this Instrument of Accession shall not affect or be deemed a waiver of the obligations of the Crown to protect the rights of this State and the rights and dignity of the Ruler thereof and to defend and protect the Ruler of this State, his Consorts, the Heir-apparent and the Ruling Dynasty of this State and its territorial integrity from external aggression or internal disorder."

The discussion with respect to this clause is contained in Part V. Class "A", of this Opinion.

PART IX.

SUMMARY.

In this opinion, suggestions are made to overcome difficulties which have arisen during the discussions with the Special Representatives of His Excellency the Viceroy.

The additional clauses and Schedules suggested in this opinion provide safeguards for all the recognized existing rights and privileges of the Rulers and their States.

1. The rights and privileges of the Ruler due his Sovereign status, and those existing by reason of his relations with the Crown and its obligations arising out of treaties and agreements, outside the Federal sphere, are continued unaffected by the accession of the State to Federation, by the proposed new clause, number 12, in the Instrument of Accession.

A list of such rights and privileges is furnished as requested by the Government of India in the List called The Crown List.

2. The rights and privileges of the Rulers with respect to subjects enumerated in the items of the Federal Legislative List accepted by the Rulers, are protected by limitations upon the power to enact laws with respect to those subjects in the First Schedule of their Instruments of Accession.

By clause numbered 5 in the Instrument of Accession accepting items in the Federal Legislative List as applicable to his State, the Ruler has granted the general powers covered by those items and must, therefore, specify the limitations co-extensive with such powers necessary to preserve his rights and privileges with respect to those items.

These limitations are safeguards against the exercise of such granted powers, whether they be exercised within or without the territorial limits of the State.

3. Existing rights and privileges which may be infringed by powers conferred by the Act on the Federation and the Provinces, but which have not been accepted by the Rulers as applicable to their States, are protected by the proposed new clause 11 in the Instrument of Accession, which renders any laws enacted by the Federation or the Provinces pursuant to such powers *inapplicable* to the Indian State in so far as it affects the existing rights and privileges of the Ruler enumerated in the Third Schedule of Additional Rights.

The rights and privileges noted in the Third Schedule are immunities from the effect of any Federal or Provincial laws which infringe these rights and privileges.

There is no attempt to lessen the powers of the Federal Authorities nor of the Provincial Authorities in reference to their respective jurisdictions. The laws enacted in the exercise of their powers, however, shall not apply to the Federated States in so far as they infringe the rights and privileges, enumerated in the Third Schedule, which have been recognized by His Majesty's Government in agreements or by established custom, in their relations with the Rulers.

The method proposed obviates a multitude of particular exceptions and reservations in the legislation of the Federation and the Provinces.

Their Legislatures may enact laws in general terms with reference to the subject matters authorised by the Act and without contravening rights and privileges reserved by the States, for these laws which otherwise would infringe the Rulers' rights have, by His Majesty's acceptance of their Instruments of Accession, been rendered inapplicable.

Whether an act of these legislatures is or is not applicable to any given State, may be readily determined by examining the Instrument of Accession.